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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SKINSCIENCE LABS, INC.,	:	
	:	
Plaintiff,	:	Civil Docket: 2:11-cv-05361-SJF-ARL
v.	:	
	:	District Judge Sandra J. Feuerstein
MICHAEL A. MCNULTY, JOHN F.	:	Magistrate Judge Arlene R. Lindsay
MCNULTY, LAUREN N. MCNULTY,	:	
NICOLE R. MCNULTY, BLUESTAR	:	
PROCESSING, INC., CASMIR USA,	:	
INC., SUMMA TRADING COMPANY	:	
INC., MARVIN LEEDS MARKETING	:	
SERVICES INC., MORRIS MOSHE	:	
PRIZANT, and ELISSA D. PELUSO,	:	
	:	
Defendants.	:	
	:	
	x	

PLAINTIFF'S PROPOSED JURY CHARGE

TO THE HONORABLE SANDRA J. FEUERSTEIN, U.S.D.J.:

In accordance with the Individual Rules of Hon. Sandra J. Feuerstein, U.S.D.J., section 6.B.i., Plaintiff SKINSCIENCE LABS, INC. ("SkinScience") respectfully submits the following Proposed Jury Charge regarding the elements of its claims.

I. INSTRUCTIONS ON LIABILITY

A. Trademark Infringement Under Federal Law

SKINSCIENCE LABS, INC., as the Plaintiff, has alleged a claim against MICHAEL A. MCNULTY, JOHN F. MCNULTY, LAUREN N. MCNULTY, NICOLE R. MCNULTY, BLUESTAR PROCESSING, INC., CASMIR USA, INC., and MARVIN LEEDS MARKETING SERVICES INC., as the defendants, for trademark infringement under federal law. Specifically, SkinScience claims that the goods sold by the defendants were counterfeits under federal law. Defendants deny such claims.

To prove a claim for trademark infringement under federal law, SkinScience must prove by a preponderance of the evidence, that:

1. SkinScience is the owner of a valid trademark; and
2. Defendants used the SkinScience's trademark in commerce, without consent, in a way likely to cause consumer confusion.

Church & Dwight Co., Inc. v. Kaloti Enters. of Michigan, LLC, 697 F. Supp. 2d 287, 290-91 (E.D.N.Y. 2009); 15 U.S.C. § 1114(1). SkinScience does not need to prove that the defendants intended to infringe or had knowledge that the products they were selling might infringe or be counterfeit. *Church*, 697 F. Supp. 2d at 291.

Once a trademark is registered with the U.S. Patent & Trademark Office, the registration carries a rebuttable presumption of validity. *CJ Prods. LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127, 151 (E.D.N.Y. 2011). Thus, SkinScience may rely upon the certificates of registration of each trademark as the sole evidence that it owns the trademarks, and that each trademark is valid. 15 U.S.C. § 1057(b).

To assess whether the defendants' use of SkinScience's mark was likely to cause confusion, you may consider the following factors. These factors are not exclusive, and your

determination of likelihood of confusion make take other evidence into account. Similarly, the absence of any one factor does not mean that likelihood of confusion is lacking.

1. The strength of the SkinScience's mark;
2. The degree of similarity between the SkinScience's marks and those used by the defendants;
3. The proximity of SkinScience's and the defendants' products in the marketplace, and their competitiveness with one another;
4. The existence of actual confusion among consumers;
5. The likelihood of the SkinScience "bridging the gap" by developing or introducing a product for sale in the markets in which the defendants were selling their products;
6. The defendants' good faith in adopting its mark;
7. The quality of the defendants' products;
8. The sophistication of the consumers.

Johnson & Johnson Consumer Cos., Inc. v. Aini, 540 F. Supp. 2d 374, 389 (E.D.N.Y. 2008) (citing *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961)).

In the present case, the SkinScience claims not only that the products sold by the defendants were confusingly similar, but that they were counterfeit. To prove that the products were counterfeit, SkinScience must show that the defendants' products were not genuine. *El Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F. 2d 392, 396 (2d Cir. 1986); *Johnson & Johnson*, 540 F. Supp. 2d at 387.

SkinScience may prove that a product sold by a defendant was not genuine, and therefore was counterfeit, by simply showing that SkinScience did not make the product in question.

SkinScience may also prove that goods sold by the defendants were not genuine, and therefore were counterfeit, if they originated from SkinScience, but when sold, differed materially from SkinScience's authorized products. *Dan-Foam A/S v. Brand Name Beds, LLC*, 500 F. Supp. 2d 296, 308-09 (S.D.N.Y. 2007); *Johnson & Johnson*, 540 F. Supp. 2d at 384-85. In this context, a material difference is any difference that consumers would likely consider to be relevant when purchasing the allegedly counterfeit product. *Johnson & Johnson*, 540 F. Supp. 2d at 385.

B. False Designation Of Origin And Unfair Competition Under Federal Law

SKINSCIENCE LABS, INC., as the Plaintiff, has alleged a claim against MICHAEL A. MCNULTY, JOHN F. MCNULTY, LAUREN N. MCNULTY, NICOLE R. MCNULTY, BLUESTAR PROCESSING, INC., CASMIR USA, INC., and MARVIN LEEDS MARKETING SERVICES INC., as the defendants, for false designation of origin and unfair competition under federal law. Defendants deny such claims.

A claim of false designations of origin and unfair competition under federal law requires the same showing as SkinScience's claim for trademark infringement under federal law. *Pretty Girl, Inc. v. Pretty Girl Fashions, Inc.*, 778 F. Supp. 2d 261, 266 n.3 (E.D.N.Y. 2011) (citing *Virgin Enters. Ltd. v. Nawab*, 335 F.3d 141, 148 (2d Cir. 2003) (citing *Time, Inc. v. Petersen Publ'g Co. L.L.C.*, 173 F.3d 113, 117 (2d Cir. 1999))). Therefore, if you find for or against SkinScience on the federal trademark infringement claim, you must make the same finding for or against the SkinScience on the federal false designations of origin and unfair competition claim. For this reason, the verdict form does not distinguish between the two federal law claims.

C. Trademark Infringement And Unfair Competition Under State Common Law

SKINSCIENCE LABS, INC., as the Plaintiff, has alleged a claim against MICHAEL A. MCNULTY, JOHN F. MCNULTY, LAUREN N. MCNULTY, NICOLE R. MCNULTY,

BLUESTAR PROCESSING, INC., CASMIR USA, INC., and MARVIN LEEDS MARKETING SERVICES INC., as the defendants, for trademark infringement and unfair competition under the New York common law. Defendants deny such claims.

A claim of trademark infringement and unfair competition under New York common law requires the same showing as SkinScience's claim for trademark infringement under federal law, and in addition, that the defendants acted in bad faith. *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, 493 F. Supp. 2d 545, 548 (E.D.N.Y. 2007); *Lorillard Tobacco Co. v. Jamelis Grocery, Inc.*, 378 F. Supp. 2d 448, 456 (S.D.N.Y. 2005).

Therefore, if you find for SkinScience on the federal trademark infringement claim, and if you find that any defendant acted in bad faith, then you must find in favor of SkinScience on its claim of trademark infringement and unfair competition under New York common law as to that defendant.

GIVEN on the ____ day of February, 2013.

The Honorable Sandra J. Feuerstein
United States District Judge

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

SKINSCIENCE LABS, INC.,	:	
	:	
Plaintiff,	:	Civil Docket: 2:11-cv-05361-SJF-ARL
v.	:	
	:	District Judge Sandra J. Feuerstein
MICHAEL A. MCNULTY, JOHN F.	:	Magistrate Judge Arlene R. Lindsay
MCNULTY, LAUREN N. MCNULTY,	:	
NICOLE R. MCNULTY, BLUESTAR	:	
PROCESSING, INC., CASMIR USA,	:	
INC., SUMMA TRADING COMPANY	:	
INC., MARVIN LEEDS MARKETING	:	
SERVICES INC., MORRIS MOSHE	:	
PRIZANT, and ELISSA D. PELUSO,	:	
	:	
Defendants.	:	
	x	

VERDICT FORM

Unless instructed otherwise, answer "Yes" or "No" to all questions. Unless otherwise instructed, the Plaintiff bears the burden of proof by a preponderance of the evidence on its respective claims. In answering such questions, a "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports an answer of "Yes," then answer "No." Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence, unless instructed otherwise. As explained in the charge, the term "preponderance of the evidence" means the claim is more likely true than not true.

Questions 1-2 pertain to claims asserted by SKINSCIENCE LABS, INC. against MICHAEL A. MCNULTY, JOHN F. MCNULTY, LAUREN N. MCNULTY, NICOLE R. MCNULTY, BLUESTAR PROCESSING, INC., CASMIR USA, INC., and MARVIN LEEDS MARKETING SERVICES INC.

Question No. 1

Do you find by a preponderance of the evidence that SKINSCIENCE LABS, INC. has proven that the following defendants are liable for trademark infringement, false designations of origin, and unfair competition under federal law as to the "DR. DENESE NEW YORK" mark (U.S. Trademark Reg. No. 3,028,108), as to the "DR. DENESE" mark (U.S. Trademark Reg. No. 3,287,587), and as to the "DENESE" mark (U.S. Trademark Reg. No. 3,923,601), by virtue of their offering for sale, selling, or distributing of the following products?

[See liability instruction I.A & I.B]

Dr. Denese Doctor's Night Recovery Cream (2 oz.)

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No
MARVIN LEEDS MARKETING SERVICES INC.	Answer: _____	Yes	_____	No

Dr. Denese Age Corrector Fill & Seal Instant Eye Firming Treatment (2 x 0.5 fl. oz.)

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No
MARVIN LEEDS MARKETING SERVICES INC.	Answer: _____	Yes	_____	No

Dr. Denese Triple Strength Neck Wrinkle Smoother (4 oz.)

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No
MARVIN LEEDS MARKETING SERVICES INC.	Answer: _____	Yes	_____	No

All of the following:

Dr. Denese Triple Strength Neck Wrinkle Smoother (0.5 oz.);
Dr. Denese Smart Concealer Duo Compact for Face and Eyes (.21 oz. eye / .27 oz. face);
Dr. Denese Smart Concealer Duo Compact for Face and Eyes (.05 oz. eye / .07 oz. face);
Dr. Denese Foundation Faker Cream Compact (0.35 oz.);
Dr. Denese HydroShield Dream Cream (3.4 oz.);
Dr. Denese HydroSeal Hand & Decollete Serum (3 oz.);
Dr. Denese Wrinkle Rx Instant Wrinkle Press (0.5 oz.);
Dr. Denese SPF 30 Neck Defense Day Cream (2 oz.);

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No

Question No. 2

Do you find by a preponderance of the evidence that SKINSCIENCE LABS, INC. has proven that the following defendants are liable for trademark infringement and unfair competition under New York Common Law as to the "DR. DENESE NEW YORK" mark, as to the "DR. DENESE" mark, and as to the as to the "DENESE" mark, by virtue of their offering for sale, selling, or distributing of the following products?

[See liability instruction I.C]

Dr. Denese Doctor's Night Recovery Cream (2 oz.)

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No
MARVIN LEEDS MARKETING SERVICES INC.	Answer: _____	Yes	_____	No

Dr. Denese Age Corrector Fill & Seal Instant Eye Firming Treatment (2 x 0.5 fl. oz.)

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No
MARVIN LEEDS MARKETING SERVICES INC.	Answer: _____	Yes	_____	No

Dr. Denese Triple Strength Neck Wrinkle Smoother (4 oz.)

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No
MARVIN LEEDS MARKETING SERVICES INC.	Answer: _____	Yes	_____	No

All of the following:

Dr. Denese Triple Strength Neck Wrinkle Smoother (0.5 oz.);
Dr. Denese Smart Concealer Duo Compact for Face and Eyes (.21 oz. eye / .27 oz. face);
Dr. Denese Smart Concealer Duo Compact for Face and Eyes (.05 oz. eye / .07 oz. face);
Dr. Denese Foundation Faker Cream Compact (0.35 oz.);
Dr. Denese HydroShield Dream Cream (3.4 oz.);
Dr. Denese HydroSeal Hand & Decollete Serum (3 oz.);
Dr. Denese Wrinkle Rx Instant Wrinkle Press (0.5 oz.);
Dr. Denese SPF 30 Neck Defense Day Cream (2 oz.);

MICHAEL A. MCNULTY	Answer: _____	Yes	_____	No
JOHN F. MCNULTY	Answer: _____	Yes	_____	No
LAUREN N. MCNULTY	Answer: _____	Yes	_____	No
NICOLE R. MCNULTY	Answer: _____	Yes	_____	No
BLUESTAR PROCESSING, INC.	Answer: _____	Yes	_____	No
CASMIR USA, INC.	Answer: _____	Yes	_____	No

(You have now completed the verdict form. The Foreperson will sign this verdict form and notify the bailiff that you have reached a verdict.)

We, the jury, unanimously answered the preceding questions as instructed on this _____ day of February, 2013.

Signed: _____

Foreperson

CONCLUSION

Plaintiff SKINSCIENCE LABS, INC. respectfully requests that the Court adopt the above proposed Jury Charge.

Respectfully submitted,

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Dated: January 11, 2013

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